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No. 01-1477

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Petitioners,

v.

MCI WORLDCOM NETWORK SERVICES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MCI WORLDCOM NETWORK SERVICES, INC., AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

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QUESTIONS PRESENTED

1. Whether a state utility commission's acceptance of Congress's invitation to arbitrate and approve terms for interconnection agreements under the Telecommunications Act of 1996 constitutes a waiver of the State's Eleventh Amendment immunity where such approval determinations are reviewable exclusively in federal court.

2. Whether this Court's definitive reasoning in *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002), that the doctrine of *Ex parte Young* applies in an official capacity action seeking prospective injunctive relief against state public utility commissioners for alleged ongoing violations of federal law, is dispositive in this official capacity suit for prospective injunctive relief against state public utility commissioners for alleged ongoing violations of the Telecommunications Act of 1996 and the FCC's implementing regulations.

3. Whether a federal court reviewing a state utility commission's interpretation of the federal Telecommunications Act of 1996 exercises *de novo* review or whether such interpretations are entitled to deference.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.) and MCImetro Access Transmission Services LLC (successor to MCImetro Access Transmission Services, Inc.) are both wholly owned subsidiaries of WorldCom, Inc. WorldCom, Inc., is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long-distance and other telecommunications services domestically and internationally. WorldCom, Inc., is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT."

WorldCom, Inc., has no parent companies. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc., owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT. ii

TABLE OF AUTHORITIES iv

STATEMENT 1

1. The Statutory Scheme 2

2. Proceedings Before the PUC and the District Courts 4

3. Court of Appeals Decisions 7

4. The *Verizon Maryland* Decision 11

REASONS FOR DENYING THE WRIT 12

I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S CORRECT REJECTION OF THE PUC'S ASSERTION OF ELEVENTH AMENDMENT IMMUNITY. 13

A. *Ex parte Young* 14

B. Waiver 17

II. THE STANDARD OF REVIEW ISSUE DOES NOT WARRANT REVIEW BY THIS COURT. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

AMISUB (PSL), Inc. v. Colorado Department of Social Services, 879 F.2d 789 (10th Cir. 1989) 21

AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 20 F. Supp. 2d 1097 (E.D. Ky. 1998) 20

AT&T Communications v. BellSouth Telecommunications, Inc., 238 F.3d 636 (5th Cir. 2001) 16, 18

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 2, 3, 4, 15, 21

Bell Atlantic-Delaware, Inc. v. McMahon, 80 F. Supp. 2d 218 (D. Del. 2000) 18

Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001), *vacated sub nom. Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002) 16, 19

Chevron USA, Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 8

FERC v. Mississippi, 456 U.S. 742 (1982) 15

GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir.), *cert denied*, 531 U.S. 957 (2000) 19

TABLE OF AUTHORITIES - continued

Page

GTE South, Inc. v. Morrison, 199 F.3d 733 (4th Cir. 1999) 20

Global Naps, Inc. v. New England Telephone and Telegraph Co., 156 F. Supp. 2d 72 (D. Mass. 2001) 20

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 8, 15, 15

Lapides v. Board of Regents of the University System of Georgia, 122 S. Ct. 1640 (2002) 19

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 2

MCI v. Bell Atlantic, 36 F. Supp. 2d 419 (D.D.C. 1999) 20

MCI Telecommunications Corp. v. BellSouth Telecommunications Corp., 112 F. Supp. 2d 1286 (N.D. Fla. 2000) 20

MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 9 F. Supp. 2d 766 (E.D. Ky. 1998) 18

MCI Telecommunications Corp. v. Illinois Commerce Commission, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) 16, 18

MCI Telecommunications Corp. v. New York Telephone Co., 134 F. Supp. 2d 490 (N.D.N.Y. 2001) 18

TABLE OF AUTHORITIES - continued

Page

MCI Telecommunications Corp. v. Public Service Commission of Utah, 216 F.3d 929 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001) 18

Mathias v. WorldCom Technologies, Inc., 122 S. Ct. 1780 (2002) 11, 12

Michigan Bell Telephone Co. v. Climax Telephone Co., 121 F. Supp. 2d 1104 (W.D. Mich. 2000) ... 18, 20

Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000) 8, 16, 19

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 17

Orthopaedic Hospital v. Belshe, 103 F.3d 1491 (9th Cir. 1997) 21

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 5

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 8

Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475 (5th Cir. 2000) 20

Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc., No. A 97-CA-132 SS, 1998 WL 657717 (W.D. Tex. Aug. 31, 1998) 20

TABLE OF AUTHORITIES - continued

Page

Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963) 15

Turner v. Perales, 869 F.2d 140 (2d Cir. 1989) 21

US West Communications, Inc. v. MFS Intelenet, Inc., 35 F. Supp. 2d 1221 (D. Or. 1998) 18

US West Communications, Inc. v. Reinbold, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997) 18

US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), *cert.denied*, 530 U.S. 1284 (2000) 20

US West Communications v. TCG Seattle, 971 F. Supp. 1365 (W.D. Wash. 1997) 18

Verizon Communications Inc. v. FCC, 122 S. Ct. 1646 (2002) 2

Verizon Maryland Inc. v. Public Service Commission of Maryland, 122 S. Ct. 1753 (2002) ..... *passim*

STATUTES

28 U.S.C. § 2342(1) 4

47 U.S.C. § 152(b) 2

47 U.S.C. § 201(b) 3

47 U.S.C. § 251(c)(2) 2, 3, 9

47 U.S.C. § 251(c)(3) 3

TABLE OF AUTHORITIES - continued

Page

47 U.S.C. § 251(c)(4) 3
47 U.S.C. § 251(d)(1) 3
47 U.S.C. § 252(a)(1) 3
47 U.S.C. § 252(b)(1) 3
47 U.S.C. § 252(d) 3
47 U.S.C. § 252(e) 3
47 U.S.C. § 252(e)(4) 4, 15, 16
47 U.S.C. § 252(e)(5) 3, 4
47 U.S.C. § 252(e)(6) 4, 19
47 U.S.C. § 253(a) 2

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-204 (1995) 2

STATEMENT

Respondents MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC (collectively, "WorldCom"), through counsel, respectfully submit this brief in opposition to the petition for certiorari filed by the Pennsylvania Public Utility Commission and its Commissioners (collectively, the "PUC"). Petitioners seek review of the decision of the United States Court of Appeals for the Third Circuit (1) rejecting, under *Ex parte Young* and principles of waiver, the PUC's assertion of Eleventh Amendment immunity from suit challenging its approval of terms for interconnection agreements under the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"); and (2) exercising *de novo* review of the PUC's interpretation of the federal Act.

Recently, this Court unanimously held that the doctrine of *Ex parte Young* permits suit in federal court against state public utility commissioners for prospective injunctive relief from the commissioners' alleged ongoing violations of the 1996 Act. *See Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. 1753, 1761 (2002). Recognizing the applicability of *Ex parte Young* to claims under the 1996 Act, the Court then declined to reach, as unnecessary, the question whether the state commissioners also had waived their Eleventh Amendment immunity by voluntarily participating in the administration of the Act. *Id.* at 1760. That decision fully resolves the *Ex parte Young* issue in this appeal and confirms that the waiver issue – on which there is no disagreement among the decisions of the courts of appeals – is not independently worthy of this Court's review. And because the Third Circuit's uncontroversial decision with respect to the standard of review is consistent with the decisions of every other court of appeals to have ruled on the issue, this Court should deny the PUC's petition for certiorari.

1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Verizon. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654 (2002); *AT&T Corp.*, 525 U.S. at 371. Toward that end, Congress altered the prior balance of federal and state regulatory authority in the area of local telecommunications. *Verizon Communications*, 122 S. Ct. at 1660-61; *AT&T Corp.*, 525 U.S. at 371. Specifically, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *AT&T Corp.*, 525 U.S. at 371-73.

In the Act, Congress expressly preempted all state laws erecting barriers to entry into telecommunications markets. 47 U.S.C. § 253(a). Congress then created three specified routes for competitive entry into local telephone markets to speed the introduction of competition. *Verizon Communications*, 122 S. Ct. at 1662. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. 47 U.S.C. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new

entrants on an unbundled basis. *Id.* § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. *Id.* § 251(c)(4). In each case, Congress prescribed specific federal standards governing the relationships between carriers, *id.* §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73, and vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards created by the Act. *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. § 201(b).

Under the Act, a new entrant that wishes to enter a local telephone market through any one or combination of these three routes must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). State commissions can also hold "generic" proceedings to set rates or establish other terms that satisfy the new federal substantive standards and that an incumbent carrier must offer to various new entrants. Finally, the results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

The Act, however, in no way *requires* state commissions to arbitrate and approve agreements submitted to them. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5). In the spirit of cooperative federalism, then, Congress vested the FCC with the primary rulemaking authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in approving terms

for interconnection agreements, 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1). If a state commission elects to participate in the Act's implementation by arbitrating and approving terms for interconnection agreements, then under section 252(e)(6) of the Act, entitled "Review of State commission actions," "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also Verizon Md. Inc.*, 122 S. Ct. at 1758; *AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel"). Such review in federal district court, moreover, is exclusive, as the Act expressly states that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4); *see also Verizon Md. Inc.*, 122 S. Ct. at 1759.

2. Proceedings Before the PUC and the District Courts

The Middle District Proceedings. In 1996, WorldCom and AT&T separately began negotiating the terms of interconnection agreements with incumbent local service provider Verizon Pennsylvania Inc. ("Verizon") (then known as Bell Atlantic-Pennsylvania, Inc.). When the negotiations reached an impasse, WorldCom and AT&T filed petitions with the PUC requesting that it arbitrate the differences arising in the

course of the negotiations with Verizon. The PUC accepted the invitation, conducted arbitration proceedings, and issued orders in which it resolved a number of open issues. It then conducted a generic proceeding to set permanent rates at which all competitors would be permitted to lease Verizon's unbundled network elements. After directing the parties to incorporate those new rates into their respective interconnection agreements, the PUC approved the WorldCom-Verizon agreement in November 1997.

Thereafter, WorldCom, AT&T and Verizon all challenged various aspects of the PUC's determinations in the United States District Court for the Middle District of Pennsylvania, pursuant to section 252(e)(6) of the Act and 28 U.S.C. § 1331. The PUC then filed a motion to dismiss, asserting immunity under the Eleventh Amendment and challenging the constitutionality of the 1996 Act under the Tenth Amendment and the Commerce Clause. That motion was denied in full. Pet. Supp. App. sa-27-sa-28. With respect to the PUC's assertion of Eleventh Amendment immunity, the court found that the suit for prospective injunctive relief against the state commissioners was properly brought under the doctrine of *Ex parte Young*, and that the PUC voluntarily accepted the offer to participate in the new federal system set forth in the Act in exchange for waiving its immunity to federal court jurisdiction. *Id.* at sa-34-sa-35.[1]

Rather than take an immediate interlocutory appeal of that denial, as was its right, *see Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993), the PUC instead litigated the merits of the parties' claims in the district court. On June 30, 2000, the district court issued a final

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[1]The district court adopted the reasoning and conclusions of the Magistrate Judge's recommendations on this issue. *See* Pet. Supp. App. sa-29-sa-36.

order disposing of all claims on their merits. Pet. Supp. App. sa-3-sa-26. In doing so, the court exercised *de novo* review over the PUC's legal determinations under the Act and refused to afford those determinations the deference that might otherwise be due the determinations of a federal agency like the FCC.

The PUC subsequently appealed the district court's denial of its claim of Eleventh Amendment immunity and various merits determinations to the United States Court of Appeals for the Third Circuit. It did not appeal the district court's denial of its motion to dismiss on Tenth Amendment and Commerce Clause grounds.

The Eastern District Proceedings. In 1998, while judicial review of the initial arbitration decision was pending in the Middle District, the PUC initiated a comprehensive review of the terms by which Verizon was providing access to its network under the 1996 Act. After Verizon and the new entrants filed competing petitions in what became known as the "Global Proceeding," the PUC in September 1999 issued the "Global Order" and directed that its many determinations be incorporated into interconnection agreements between Verizon and all competing carriers. Among other things, the Global Order somewhat reduced the rates at which Verizon was required to lease its network elements to competitors.

In response, Verizon filed a complaint in the United States District Court for the Eastern District of Pennsylvania on October 29, 1999, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Verizon contended that the PUC's pricing determinations in the Global Order were inconsistent with the 1996 Act and the FCC's implementing regulations. Before the PUC filed an answer to Verizon's federal court complaint, however, the PUC, Verizon, WorldCom, AT&T and other parties to the Global Proceeding agreed to commence

settlement negotiations and to stay all judicial challenges to the Global Order. Those negotiations proved unsuccessful. Thus, on February 8, 2000, WorldCom filed a motion to intervene in the federal action, along with its proposed answer, counterclaim and cross-claim challenging the lawfulness of the rates set by the PUC in the Global Order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. WorldCom's motion for intervention was granted on March 2, 2000.

On May 18, 2000, the PUC filed a motion to dismiss the various parties' claims and cross-claims. The PUC alleged, *inter alia*, that the PUC and the individual commissioners were immune from suit in federal court under the Eleventh Amendment. A group of Pennsylvania State Senators who had participated in the Global Proceeding and intervened in federal court moved for judgment on the pleadings on the same grounds. The district court denied both motions to dismiss in full. Like its counterpart in the Middle District, the Eastern District court held that the PUC had waived its Eleventh Amendment immunity by voluntarily participating in the regulatory scheme designed by Congress under the 1996 Act, and that, in any event, suit against the individual PUC Commissioners was proper under the doctrine of *Ex parte Young*. Pet. Supp. App. sa-46-sa-56. The PUC and the Senators then filed interlocutory appeals in the Third Circuit.[2]

3. Court of Appeals Decisions

In two decisions issued the same day, a unanimous panel of the Third Circuit affirmed the two district courts' rejection

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[2]Neither the PUC nor the Senators raised a Tenth Amendment or Commerce Clause claim before either the Eastern District court or the court of appeals.

of the PUC's assertion of Eleventh Amendment immunity.[3] Pet. App. 12a-33a, 48a-53a, 60a, 66a. That court held that the two suits were proper *Ex parte Young* actions, and that nothing in the Act precluded reliance on *Ex parte Young* as a basis for federal court review. *Id.* at 30a. It thus expressly agreed with the Sixth Circuit's statement in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000), that a lawsuit challenging a state commission's approval of an interconnection agreement is "'a straightforward *Ex parte Young* case.'" Pet. App. 30a. The court explained that *Ex parte Young* continues to apply "any time a plaintiff seeks prospective relief against individual state officers from an ongoing violation of federal law," as the carriers sought in the cases below. *Id.* at 31a-32a. It also rejected the PUC's contentions that either *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), imposed any limitations on the application of *Ex parte Young* to suits under the 1996 Act. Pet. App. 32a-33a.

In addition, relying on this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Third Circuit held that, although Congress could not abrogate Pennsylvania's sovereign immunity, Pet. App. 13a, Pennsylvania consented to being subject to suit in federal court when it voluntarily chose to participate in the Act's regulatory scheme. Pet. App. 23a ("the submission to suit in federal court, provided for in § 252(e)(6), is valid as a waiver"). Noting the exclusivity of federal court review under the Act, Pet. App. 28a (citing 47 U.S.C. § 252(e)(4)), the court explained that participation in the

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[3]One member of the panel dissented on a merits issue not relevant to the instant petition. Pet. App. 53a-54a.

Act's regulatory scheme was a gratuity that Congress granted to states expressly conditioned on their willingness to waive their immunity to suit in federal court. *Id.* at 24a-25a; *see also id.* at 28a ("The statutory language places the state utility commission on notice that, by choosing to act on an interconnection agreement and to make a decision as to its legality, it submits itself to the jurisdiction of the federal courts."); *id.* at 24a (Congress "validly terminated the states' role in regulating local telephone competition" and then "permitted the states to resume a role in that process" – thus creating a "congressionally bestowed gratuity").[4]

Finally, the Third Circuit affirmed the Middle District court's exercise of *de novo* review over the PUC's legal interpretations of the 1996 Act. *Id.* at 34a-36a. In so holding, the court rejected the PUC's attempt to carve out an exception to the general rule that the deferential standard of review under *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), applies only to federal agencies and not state commissions.

As the court cogently explained:

> [D]eference is accorded to the interpretations of federal statutes by federal administrative agencies, not to interpretations by state agencies. *See GTE South*, 199 F.3d at 745 (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997)).
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> * * *
>
> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the

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[4]The Third Circuit did not address the Tenth Amendment or Commerce Clause because the PUC did not raise Tenth Amendment or Commerce Clause arguments before that court. *See* Pet. App. 10a n.1.

statute through binding rulemaking. *See [United States v.] Mead*, 121 S. Ct. [2164,] 2171 [(2001)]. The power to promulgate binding regulations to implement the requirements of the Act and to fill statutory gaps was granted to the FCC, *see* 47 U.S.C. § 251(d)(1), and those regulations are entitled to deference. *See Mead*, 121 S. Ct. at 2172 (stating that a good indicator of delegation meriting *Chevron* deference is an express congressional authorization for an agency to engage in the rulemaking process). . . . State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

In fact, deference to the state commissions would often be impossible, given the explicit delegation of rulemaking authority to the FCC in § 251(d)(1). The interconnection agreement must comply with the Act and with FCC regulations; if the approved agreement, containing the state commission's interpretations of the law, conflicts with the legal interpretations in the FCC regulations, the FCC interpretation must control under the Supremacy Clause and under the plain language of the Act. If, therefore, the PUC's interpretation conflicts with that of the FCC, the PUC's determination must be struck down.

* * *

We will, therefore, review any PUC legal interpretations contained in the arbitration and interconnection agreement *de novo*.

Pet. App. 34a-36a.

4. The *Verizon Maryland* Decision

In *Verizon Maryland*, Verizon Maryland Inc. challenged the lawfulness of a decision of the Maryland Public Service Commission ("MPSC") interpreting and enforcing the reciprocal compensation provisions of an interconnection agreement previously approved under the 1996 Act. Specifically, Verizon alleged, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, that the MPSC's decision constituted an ongoing violation of the 1996 Act and the FCC's implementing regulations. In response, the MPSC claimed that the federal courts lacked subject matter jurisdiction over Verizon's challenge to the MPSC's enforcement determination, and that the MPSC and its commissioners enjoyed Eleventh Amendment immunity from suit in federal court.

On May 20, 2002, this Court unanimously rejected both of the MPSC's claims. First, the Court determined that Verizon's complaint stated a federal claim cognizable under 28 U.S.C. § 1331, regardless of whether Section 252(e)(6) of the 1996 Act might also bestow jurisdiction on the federal courts. *Verizon Md. Inc.*, 122 S. Ct. at 1759.

The Court then held that Verizon's suit seeking prospective injunctive relief for alleged ongoing violations of the 1996 Act "may proceed against the individual [MPSC] commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)." *Id.* at 1760.[5] The Court thus rejected the

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[5]Oral argument in *Verizon Maryland* was consolidated with argument in *Mathias v. WorldCom Technologies, Inc.*, No. 00-878. This Court dismissed the writ of certiorari in *Mathias* as improvidently granted on the day that it issued the *Verizon Maryland* decision. *Mathias v. WorldCom*

Fourth Circuit's reasoning that *Ex parte Young* did not apply because the commission's order likely was consistent with federal law. *Id.* at 1760-61. As the Court reaffirmed, it is enough that the plaintiff's complaint merely *allege* a non-frivolous violation of federal law; "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits." *Id.* (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)). In addition, the Court refused to impose any independent limitation, under the principles enunciated in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), on the application of *Ex parte Young* to claims under the 1996 Act. It explained that the 1996 Act does not create the type of limited remedial scheme that was at issue in *Seminole Tribe*, and therefore does not demonstrate any intent to foreclose *Ex parte Young* jurisdiction. 122 S. Ct. at 1761.

Finally, because it found that Verizon's suit could proceed pursuant to *Ex parte Young*, the Court found it unnecessary to address the question of whether the state commission had waived its Eleventh Amendment immunity by voluntarily participating in the Act's regulatory scheme. *Id.* at 1760.

REASONS FOR DENYING THE WRIT

The PUC's petition should be denied because this Court has already determined in *Verizon Maryland* that suits against state public utility commissioners for prospective relief from ongoing violations of the 1996 Act are cognizable in federal court under the doctrine of *Ex parte Young*. Although that case arose in the context of a challenge to a state commission's *enforcement* of a previously approved interconnection agreement, and this case presents a challenge to the PUC's *approval* of terms for interconnection agreements in the first

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Techs., Inc., 122 S. Ct. 1780 (2002).

instance, the approval context presents the easier, more straightforward case. *A fortiori*, *Verizon Maryland* is dispositive. And, as the Court explained in *Verizon Maryland*, resolution of the *Ex parte Young* issue obviates the need for this Court to reach the Eleventh Amendment waiver question.

Moreover, neither of the immunity questions presented here has divided the courts of appeals. The Third Circuit's decisions on the *Ex parte Young* and waiver issues are consistent with the rulings of *every* other court of appeals that has ruled on those issues in the approval context. This Court has repeatedly denied petitions for certiorari raising Eleventh Amendment arguments in approval cases, *see infra*, note 10 and p. 18, and in light of *Verizon Maryland*, there is even more reason for the Court to do so again here.

Finally, the Third Circuit's exercise of *de novo* review over the PUC's interpretation and application of the 1996 Act is consistent with the decisions of every other court of appeals to reach the issue and is not independently certworthy. Federal courts uniformly have exercised plenary review over a state agency's interpretation of *any* federal statute, *including the 1996 Act*. There certainly is no reason for the Court to grant review on this entirely uncontroversial issue.

I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S CORRECT REJECTION OF THE PUC'S ASSERTION OF ELEVENTH AMENDMENT IMMUNITY.

In *Verizon Maryland*, this Court had no difficulty unanimously holding that, for claims seeking prospective relief against ongoing violations of the 1996 Act, "the doctrine of *Ex parte Young* permits [a carrier's] suit to go forward against . . . state commissioners in their official capacities." *Verizon Md. Inc.*, 122 S. Ct. at 1761. That decision renders review of both

Eleventh Amendment issues presented here unnecessary.

A. *Ex parte Young*

In the wake of *Verizon Maryland*, it is now clear that, with respect to the application of *Ex parte Young*, there is nothing unique about the 1996 Act. As with virtually every other federal statute, suits against state commissioners under the 1996 Act require only the "'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.*, 122 S. Ct. at 1760 (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 296).[6]

For purposes of this "straightforward" *Ex parte Young* analysis, the claims for relief in this case are identical in all material respects to the claims that were properly brought in federal court in *Verizon Maryland.* As in *Verizon Maryland*, the claims for relief here allege that various orders of the state utility commissioners constitute ongoing violations of the 1996 Act and the FCC's implementing regulations, and seek purely prospective injunctive and declaratory relief to remedy those violations. *Compare Verizon Md. Inc.*, 122 S. Ct. at 1760-61, *with* Pet. App. 31a-32a. Thus, after *Verizon Maryland*, there can be no doubt that the Third Circuit properly held that the parties' claims here are cognizable in federal court under the doctrine of *Ex parte Young*, and the PUC's petition should be denied.

Indeed, the only manner in which this case differs from

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[6]In doing so, the Court rejected the application of the limiting principle articulated in *Seminole Tribe* because, according to the Court, the 1996 Act does not "'impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*.'" *Verizon Md. Inc.*, 122 S. Ct. at 1761 (quoting *Seminole Tribe*, 517 U.S. at 75-76).

Verizon Maryland is that this is a challenge to a state commission approval determination whereas *Verizon Maryland* was a challenge to a state commission enforcement order. But that makes this case only easier, not harder. For example, unlike in *Verizon Maryland*, here there is no dispute that the plaintiffs' claims arise under section 252(e)(6) of the Act and are within the subject matter jurisdiction of the federal courts. Pet. at 21, 27; Pet App. at 21a-22a. Here, unlike in *Verizon Maryland*, that jurisdiction is exclusive, *see* 47 U.S.C. § 252(e)(4)[7]; *Verizon Md. Inc.*, 122 S. Ct. at 1759, and the unavailability of a federal forum for the plaintiffs' federal claims would thus render plaintiffs wholly without a remedy at the approval stage.[8] Because this case is virtually identical to

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[7]The PUC's passing suggestion that the Act's exclusive jurisdiction provision, section 252(e)(4), is unconstitutional under the Tenth Amendment and Commerce Clause is not properly before this Court. *See* Pet. at 26-27. That issue is not within the scope of the questions presented, was not addressed by the Third Circuit, and, though soundly rejected by the Middle District court, Pet. Supp. App. sa27-sa36, was not raised by the PUC in the court of appeals below. The argument also lacks even a semblance of merit. This Court has already held that Congress possessed the requisite constitutional authority to pass the 1996 Act in the first instance, thereby federalizing those areas of local telephone competition addressed by the Act. *See AT&T Corp.*, 525 U.S. at 378 n.6; *FERC v. Mississippi*, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963) (the authority of Congress to preempt state laws "is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature").

[8]To be sure, the unavailability of state court review is not a prerequisite to the application of *Ex parte Young*. *See Coeur d'Alene*, 521 U.S. at 272. Even where a state forum may be available (as in the enforcement context), review in federal court under the doctrine of *Ex parte Young* is still permissible. *Id.*; *see also Verizon Md. Inc.*, 122 S. Ct. at 1760-61 (applying *Ex parte Young* even though "it may (or may not) also be true that state

– indeed, easier than – *Verizon Maryland*, there certainly is no reason for this Court to grant review of the Third Circuit's opinion, which is in all respects consistent with that decision.[9]

Though it is largely irrelevant now, it is nonetheless worth noting that, contrary to the Petitioners' suggestion, Pet. at 15-16, *every* court of appeals to have addressed the issue has agreed that *Ex parte Young* applies in an approval case such as this. Indeed, five courts of appeals have explicitly held that a federal law challenge to an approval determination of a state commission is a "straightforward *Ex parte Young* case," and *none* has disagreed.[10] In light of *Verizon Maryland*, there certainly is no reason to grant review of that conclusion now.

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contract law, and not federal law" applied). But where, as here (in the approval context), state court review is preempted, *see* 47 U.S.C. § 252(e)(4), the need for federal court review under *Ex parte Young* of a state actor's interpretation and application of federal law is paramount. *See Coeur d'Alene*, 521 U.S. at 271.

[9]The PUC's remaining arguments, that the State here is the real party in interest and that the state commissioners were "authorized" by Congress to implement the 1996 Act, Pet. at 22-26, all were fully briefed to this Court in *Verizon Maryland* to no avail.

[10]*See* Pet. App. 30a-33a (3d Cir.); *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 647 (5th Cir. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000); *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323, 345 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001). Of course, the PUC can no longer even attempt to manufacture a split in the circuits by relying on the Fourth Circuit's recently vacated decision in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), *vacated sub nom. Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002).

B. Waiver

In *Verizon Maryland*, this Court explicitly stated that it was unnecessary for it to decide the waiver issue because "even absent waiver" the case could proceed in federal court under the doctrine of *Ex parte Young*. *Verizon Md. Inc.*, 122 S. Ct. at 1760. It follows that, because *Ex parte Young* disposes equally of the assertion of Eleventh Amendment immunity here, the same restraint articulated in *Verizon Maryland* dictates that there is no reason to grant the PUC's petition on the waiver issue in this case.

Indeed, it would make little sense for this Court now to grant review of the very same issue that it declined to reach when that issue was squarely before it, and fully briefed, earlier this Term. Here, the *only* impact of a reversal on the waiver question would be to require the ministerial deletion of the Pennsylvania Commission (as a body) from the caption, and the case still would proceed against the commissioners in their official capacities under *Ex parte Young*. The Court thus should decline to review the waiver issue at this time, which, at least as a practical matter, remains purely academic.[11]

Moreover, the Third Circuit's ruling on the waiver issue is consistent with the decisions of *every* other court of appeals

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[11]The restraint showed in *Verizon Maryland* certainly is nothing new. Where a case can be decided on a ground that is relatively simpler and less controversial, this Court's consistent practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, particularly where they would not affect the outcome of the case. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").

that has resolved it. Every court of appeals to have ruled on the waiver issue in the approval context has faithfully followed this Court's teachings in *College Savings Bank* and agreed that a state commission that chooses to participate in the Act's regime does so in exchange for waiving its immunity to suit in federal court – and this Court has consistently denied petitions for certiorari in those cases when presented. *See MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323, 340-44 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001).[12]

The PUC nevertheless invokes the decisions of the Fourth and Sixth Circuits in a transparent attempt to fabricate a split in the circuits on this issue. Pet. at 15-16. That attempt is unavailing for two reasons. First, in *Verizon Maryland*, this Court vacated the very Fourth Circuit decision on which the PUC relies. *Verizon Md. Inc.*, 122 S. Ct. at 1761. Moreover, the Fourth Circuit had held (erroneously in WorldCom's view) that the parties' enforcement challenge there did not arise under

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[12]The overwhelming majority of district courts that have ruled on the waiver question likewise have held that states voluntarily waive their sovereign immunity when they voluntarily participate in the Act's regulatory scheme. *See, e.g., MCI Telecommunications Corp. v. New York Tel. Co.*, 134 F. Supp. 2d 490 (N.D.N.Y. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d 1104 (W.D. Mich. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. Jul 28, 1997).

section 252(e)(6) of the 1996 Act. *See Bell Atlantic Md.*, 240 F.3d at 301-07. Accordingly, it came as no surprise that the court also held that section 252(e)(6) failed to put the state commission on notice that its enforcement of a previously approved interconnection agreement would waive its immunity from suit in federal court. *Id.* Here, there is no dispute that section 252(e)(6) expressly addresses state commission approval determinations and subjects those determinations to review in federal court. *See* 47 U.S.C. § 252(e)(6); *Verizon Md. Inc.*, 122 S. Ct. at 1758. Accordingly, the Fourth Circuit's rejection of the waiver doctrine in the enforcement context (even if it had not been vacated) is inapposite.[13]

Petitioners also invoke the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000), as demonstrating a division of authority. But that case held only that *Ex parte Young* authorized suit in federal court. *See also Michigan Bell v. Climax Tel.*, 202 F.3d at 867. Like this Court in *Verizon Maryland*, the Sixth Circuit did not go on to address the waiver issue because its *Ex parte Young* determination rendered doing so unnecessary. *See* 209 F.3d at 922 n.6. Thus, the *Strand* court's discussion of the waiver doctrine came only in a footnote in pure and acknowledged dicta. *Id.* Indeed, the state commission itself was not even a defendant in *Strand*. *Id.* at 912. Accordingly, the Sixth Circuit's analysis – of declining to rule on the waiver

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[13]At a minimum, the PUC certainly had notice that it would be subject to suit in federal court by the time that it began the Global Proceeding, as it had already been sued in the Middle District court and its immunity claims had already been rejected there. Pet. Supp. App. sa27-sa28. The decision to arbitrate despite explicit knowledge that a federal court action could ensue surely constitutes waiver. *Cf. Lapides v. Board of Regents of the Univ. System of Ga.*, 122 S. Ct. 1640 (2002) (state attorney general's litigation conduct in removing state court action to federal court constitutes waiver of Eleventh Amendment immunity).

issue after holding that *Ex parte Young* applied – is consistent with this Court's reasoning in *Verizon Maryland* and underscores the futility of this Court's granting review on the waiver issue here.

II. THE STANDARD OF REVIEW ISSUE DOES NOT WARRANT REVIEW BY THIS COURT.

The appropriate scope of review is not independently worthy of review by this Court, particularly in a petition like this one, in which no merits questions are presented. The Third Circuit's analysis of this straightforward issue was cogent and well-reasoned. *See supra* pp. 9-10. And *every* court of appeals that has addressed this uncontroversial issue has agreed that federal courts should conduct *de novo* review of a state commission's interpretation of the federal 1996 Act. *See, e.g.*, Pet. App. at 34a-36a (3d Cir.); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).[14]

Petitioners candidly admit that *de novo* review is the norm in such circumstances and are unable to cite a single case granting deference to a state commission's interpretation of the

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[14]District courts have consistently reached the same result. *See, e.g., Global Naps, Inc. v. New England Tel. and Tel. Co.*, 156 F. Supp. 2d 72, 77 (D. Mass. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d at 1108-09; *MCI Telecommunications Corp. v. BellSouth Telecommunications Corp.*, 112 F. Supp. 2d 1286, 1291-92 (N.D. Fla. 2000); *MCI v. Bell Atlantic*, 36 F. Supp. 2d 419, 422-23 (D.D.C. 1999); *AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, 1998 WL 657717, at *3 (W.D. Tex. Aug. 31, 1998).

1996 Act or any other federal law. Indeed, federal courts routinely exercise plenary review over a state agency's interpretation and application of federal law. *See, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989) (reviewing Medicaid Act). They do so because state agencies simply do not have the expertise or familiarity that a federal agency has when administering its own statutory mandate. *See Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997) (reviewing Medicaid Act); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) (reviewing National Housing Act). Unlike federal agencies, state agencies are not typically concerned with "the need for coherent and uniform construction of federal law nationwide." *Turner*, 869 F.2d at 141. Here, Congress ensured federal uniformity by granting the FCC exclusive rulemaking authority, thereby rendering deference to state commissions' interpretations of the statute wholly inappropriate.

Deference to inconsistent state commission interpretations of the 1996 Act would cripple the ability of federal courts to provide guidance on the meaning of the Act and the FCC's regulations, and would inject an unacceptable degree of uncertainty into the implementation of the Act's pro-competitive goals. *See AT&T Corp.*, 525 U.S. at 378 n.6, 385 n.10. This Court should deny review of this entirely uncontroversial issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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